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INDEX

	Page
Opinions of the case	1
Jurisdiction	2
Questions presented	2
Relevant facts	2
Reasons for granting the writ	3
Argument	4
Conclusion	8

Cases Cited

Aetna Casualty and Surety Company v. Yeatts, 122 F.2d 350 (4th Cir. 1941)	4
Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2nd Cir. 1965), cert. denied, 382 U.S. 983 (1965)	6
Binder v. Commercial Travelers Mutual Accident Association of America, 165 F.2d 896 (2nd Cir. 1948)	4
Continental Airlines, Inc. v. Wagner-Morehouse, Inc., 401 F.2d 23 (7th Cir. 1968)	6
Century "21" Shows v. Owens, 400 F.2d 603 (1968)	7
Daffinrud v. United States, 145 F.2d 724 (7th Cir. 1944)	4
Duncan v. Duncan, 377 F.2d 49 (6th Cir.)	6, 7
Fain v. Duncan, 389 U.S. 913 (1967)	6

Fairmont Glass Works v. Cub Fork Coal Company, 287 U.S. 474 6

Fireman's Fund Insurance Company v. Aalco Wrecking Company, 466 F.2d 179 4

Greene v. Werven, 275 F.2d 134 (8th Cir. 1960) 7

Grove v. Dun & Bradstreet, Inc., 438 F.2d 433 (3rd Cir. 1971), cert. denied, 92 S. Ct. 204 6

Horston v. Harvlan, Inc., 457 F.2d 1105 (3rd Cir. 1962) 6

Lewin v. Metropolitan Life Insurance Company, 394 F.2d 608 (3rd Cir. 1968) 6

Lind v. Schenley Industries, Inc., 278 F.2d 79 (3rd Cir.), cert. denied, 364 U.S. 835 (1960) 4, 5, 6

Milprint, Inc. v. Donaldson Chocolate Company, 222 F. 2d 898 (8th Cir. 1955) 7

Moist Cold Refrigerator Company, Inc. v. Lon Johnson Co., Inc., 249 F.2d 246 (9th Cir. 1957) 4

O'Neil v. W. R. Grace and Co., 410 F.2d 908 (5th Cir. 1969) 6

Pettingill v. Fuller, 107 F.2d 933 (2nd Cir. 1939), cert. denied 309 U.S. 669 (1940) 5

Powell v. Litity Mutual Insurance Company, 419 F.2d 62 (5th Cir. 1969) 6

Ross v. Chesapeake & Ohio Railway Company, 421 F. 2d 328 (6th Cir. 1970) 6

Taylor v. Washington Terminal Company, 409 F.2d 145 (D.C. Cir. 1969) 5, 6

Turner v. United States, 229 F.2d 944 (6th Cir. 1956) 4

United States v. Johnson, 327 U.S. 106 7

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 7

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-903

AALCO WRECKING COMPANY, INC.,
Petitioner,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation; MILLER'S MUTUAL INSURANCE COMPANY, a Corporation; AMERICAN MOTORISTS INSURANCE COMPANY, a Corporation; NORTHWESTERN MUTUAL INSURANCE COMPANY, a Corporation; PENNSYLVANIA NATIONAL MUTUAL INSURANCE COMPANY, a Corporation; THE GENERAL INSURANCE CORPORATION, a Corporation; and COMMERCIAL UNION INSURANCE COMPANY OF AMERICA, a Corporation,
Respondents.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

OPINIONS OF THE CASE

Both the opinion of the Court of Appeals for the Eighth Circuit entered on August 7, 1972, and the dissenting opinion to the order of the Court of Appeals for the Eighth Circuit denying the Petition for Rehearing have been reported at 466 F.2d 179.

JURISDICTION

The jurisdictional statement in the Petition for Certiorari is correct.

QUESTIONS PRESENTED

1. Whether an abuse of discretion by a United States District Judge in granting a new trial is immune from review by the Courts of Appeal.

RELEVANT FACTS

The evidence at trial established that the fire started on the premises controlled by Petitioner. The first witnesses to observe the fire at close range, Mr. Martin Brutton and Mr. Clifford Brown, testified that the fire was confined to the area of the demolition site controlled by Petitioner. Petitioner's own expert placed the origin of the fire in the area controlled by Petitioner.

The evidence is undisputed that the fire burned for up to one hour before it was discovered and that because of this delay in discovery, the St. Louis Fire Department was unable to prevent the spread of the fire to the adjoining property. If the fire had been reported ten to fifteen minutes earlier, the Fire Department could have prevented its spread. It was also undisputed that under the circumstances of this case, a watchman would have been the most effective means of preventing a delayed alarm.

Both the St. Louis city ordinance and the custom and practice of the demolition industry require that a watchman be present on the demolition site after working hours if the site cannot be secured. It is admitted by Petitioner that no watchman was present. At trial, Petitioner chose

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to justify the absence of a watchman by claiming that the buildings were secure. Notwithstanding this claim, Petitioner's own employees testified that the buildings had been broken into on several occasions. In addition, members of the St. Louis Police and Fire Departments testified that the buildings were not secure.

The only specific objection to any testimony the trial court gave as a reason for granting a new trial was Item 14 of Petitioner's alternative motion. That item objects to testimony by Captain Klein with reference to the early discovery of the fire occurring on August 4, 1965, had a watchman been present at the scene. In point of fact, Captain Klein never testified that a watchman, had one been present, would have discovered the fire as this claimed error would suggest. The testimony of Captain Klein that had this fire been discovered ten to fifteen minutes earlier, the Fire Department could have put out the fire prior to its reaching Respondents' insureds' building was uncontradicted. This testimony was admitted by the trial court and was not raised as a ground for granting a new trial.

REASONS FOR DENYING THE WRIT

No decision of this Court denies the courts of appeal the power to correct an abuse of discretion by a district judge in ordering a new trial in a jury case. The courts of appeal are unanimous in asserting that the power exists. The extremely rare instances of reversal of a district judge's decision on this ground demonstrates the insignificance of the question presented by the Petition for Certiorari.

There are no special or important reasons for granting the Writ under United States Supreme Court Rule 19.

ARGUMENT

The Court of Appeals for the Eighth Circuit, after a careful review of the facts, found that the district court had abused its discretion in granting a new trial on the ground that the verdict was against the weight of the evidence. **Fireman's Fund Insurance Company v. Aalco Wrecking Company,** 466 F.2d 179, 187-188. The narrow question presented on this Petition is whether a court of appeals has the power to make such a determination. The decision of the court of appeals in this case that it had the power to review the grant of a new trial and reverse the trial court if the grant was an abuse of discretion is not in conflict with either the decisions of this court, the decisions of the other courts of appeal, or the Federal Rules of Civil Procedure.

Prior to the amendment of the Federal Rules of Civil Procedure in 1963, there was some confusion among the courts of appeal as to the reviewability of orders conditionally granting new trials when the accompanying judgment notwithstanding the verdict was reversed. Some courts of appeal held that such orders were not reviewable, **Binder v. Commercial Travelers Mutual Accident Association of America,** 165 F.2d 896 (2nd Cir. 1948), while others held they were reviewable and could be reversed if the trial court had abused its discretion in conditionally granting a new trial. **Aetna Casualty and Surety Company v. Yeatts,** 122 F.2d 350 (4th Cir. 1941); **Turner v. United States,** 229 F.2d 944 (6th Cir. 1956); **Daffinrud v. United States,** 145 F.2d 724 (7th Cir. 1944); **Moist Cold Refrigerator Company, Inc. v. Lon Johnson Co., Inc.,** 249 F.2d 246 (9th Cir. 1957); **Lind v. Schenley Industries, Inc.,** 278 F.2d 79 (3rd Cir.), cert. denied, 364 U.S. 835 (1960). Even prior to the 1963 amendments to the Rules, the grant of a new trial was reviewable in connection with the appeal

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from the judgment rendered at the conclusion of the second trial, where the trial judge had abused his discretion in awarding a new trial in the first instance. **Pettingill v. Fuller,** 107 F.2d 933 (2nd Cir. 1939), cert. denied 309 U.S. 669 (1940).

In 1963, this confusion was cleared up by the amendment of Rule 50 of the Federal Rules of Civil Procedure. The power of the courts of appeal to reverse an alternative grant of a new trial cannot be seriously challenged in view of the amendment to Rule 50. The note of the Advisory Committee accompanying the 1963 amendment to Rule 50 states:

> "The party against whom the judgment n.o.v. was entered below may, as appellant, besides seeking to overthrow that judgment, also attack the conditional grant of the new trial. And, the Appellate Court, if it reverses the judgment n.o.v., may in an appropriate case also reverse the conditional grant of the new trial and direct that judgment be entered on the verdict."

Of particular interest is the citation by the Advisory Committee, as authority for this statement, of **Lind v. Schenley Industries, Inc.**, *supra*, wherein the Court of Appeals for the Third Circuit found an abuse of discretion and reversed a conditional order granting a new trial.

Thus, it is now clear that an order conditionally granting a new trial may be reviewed for an abuse of discretion, even when based upon such broad grounds as the trial judge's conclusion that the verdict was excessive or was against the weight of the evidence. **Taylor v. Washington Terminal Company**, 409 F.2d 145 (D.C. Cir. 1969).

A number of courts of appeal have had occasion to review and reverse orders conditionally granting a new

trial. **Lewin v. Metropolitan Life Insurance Company**, 394 F.2d 608 (3rd Cir. 1968); **Duncan v. Duncan**, 377 F.2d 49 (6th Cir.), cert. denied, **Fain v. Duncan**, 389 U.S. 913 (1967); **O'Neil v. W. R. Grace and Co.**, 410 F.2d 908 (5th Cir. 1969); **Continental Airlines, Inc. v. Wagner-Morehouse, Inc.**, 401 F.2d 23 (7th Cir. 1968); **Horston v. Harvlan, Inc.**, 457 F.2d 1105 (3rd Cir. 1962); **Berner v. British Commonwealth Pacific Airlines, Ltd.**, 346 F.2d 532 (2nd Cir. 1965), cert. denied, 382 U.S. 983 (1965); **Powell v. Litity Mutual Insurance Company**, 419 F.2d 62 (5th Cir. 1969); **Taylor v. Washington Terminal Company**, 409 F.2d 145 (D.C. Cir. 1969); **Grove v. Dun & Bradstreet, Inc.**, 438 F.2d 433 (3rd Cir. 1971), cert. denied, 92 S. Ct. 204; **Ross v. Chesapeake & Ohio Railway Company**, 421 F.2d 328 (6th Cir. 1970).

The repeated denial by this court of certiorari to courts of appeal which have reversed the conditional grant of a new trial where the trial judge has abused his discretion negates the assertion in the Petition for Certiorari that uncertainty or a conflict exists with respect to the principle of law to be followed in such cases. Particularly, this court denied certiorari in **Lind v. Schenley Industries, Inc.**, 278 F.2d 79 (3rd Cir.), cert. denied, 364 U.S. 835 (1960); in **Berner v. British Commonwealth Pacific Airlines, Ltd.**, 346 F.2d 532 (2d Cir.), cert. denied, 382 U.S. 983 (1965), and in **Duncan v. Duncan**, 377 F.2d 49 (6th Cir.), cert. denied, **Fain v. Duncan**, 389 U.S. 913 (1967).

The cases relied upon by the Petitioner here do not support the proposition that the courts of appeal are forbidden to review the conditional grant of a new trial for an abuse of discretion. In their case of main reliance, **Fairmont Glass Works v. Cub Fork Coal Company**, 287 U.S. 474, 485, this court stated:

> "Whether refusal to set aside a verdict for failure to award substantial damages may ever be reviewed

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on the ground that the trial judge abused his discretion, we have no occasion to determine."

In **United States v. Socony-Vacuum Oil Co.**, 310 U.S. 150, 247, this court stated that the action of the trial judge was not reviewable on certain defendants' appeals, "unless they can establish that such action was so clearly prejudicial to them that the denial of their motions constituted a plain abuse of discretion." **United States v. Johnson**, 327 U.S. 106, did not involve a verdict at all, but a trial court's findings of fact.

Petitioner would have this Court say that the decisions of this Court and the Federal Rules of Civil Procedure, mean that a verdict can be taken away repeatedly, without cause, and without appellate supervision, until an adverse verdict is finally returned or pursuit of the cause is abandoned through the exhaustion of determination or financial resources. It is respectfully submitted that this Court will never countenance such a perversion of common sense.

Recognizing that its principal argument is untenable, Petitioner apparently argues that a "clear" or "patent" abuse of discretion is necessary in order to reverse the conditional grant of a new trial. None of the cases cited by Petitioner from other circuits so hold, although the Court of Appeals for the Sixth Circuit uses the terms "abuse of discretion" and "clear abuse of discretion" interchangeably. See e.g., **Duncan v. Duncan**, 377 F.2d 49, 53, 55 (1967). The Eighth Circuit also has cases which use the term "clear" or "patent" abuse of discretion and those which use the term "abuse of discretion." Compare cases cited by Petitioner with **Milprint, Inc. v. Donaldson Chocolate Company**, 222 F.2d 898 (8th Cir. 1955); **Greene v. Werven**, 275 F.2d 134 (8th Cir. 1960); **Century "21" Shows v. Owens**, 400 F.2d 603 (1968).

There is no need for this court to review the action of the court below in reversing the alternative grant of

a new trial as an abuse of discretion since such action is authorized by Rule 50 and, as demonstrated by the opinion below, was entirely appropriate in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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